BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
AND THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.24.132, 17.24.133, 17.24.134, 17.24.136, 17.24.1206, 17.24.1211, 17.24.1218, 17.24.1219, 17.24.1220, 17.56.121 and the repeal of 17.24.1212 pertaining to revising enforcement procedures under the Montana Strip and Underground Mine Reclamation Act, the Metal Mine Reclamation Laws and the Opencut Mining Act, and the amendment of ARM 17.30.2001, and 17.30.2003, repeal of 17.24.1212, 17.30.2005, 17.30.2006 and 17.38.606 and the adoption of new rules I through VII pertaining to providing uniform factors for determining penalties	NOTICE OF AMENDMENT, REPEAL AND ADOPTION (AIR QUALITY) (ASBESTOS) (HAZARDOUS WASTE) (JUNK VEHICLES) (MAJOR FACILITY SITING) (METAL MINE RECLAMATION) (OPENCUT MINING) (PUBLIC WATER SUPPLY) (SEPTIC PUMPERS) (SOLID WASTE) (STRIP AND UNDERGROUND MINE RECLAMATION) (SUBDIVISIONS) (UNDERGROUND STORAGE TANKS) (WATER QUALITY)

TO: All Concerned Persons

1. On December 22, 2005, the Board of Environmental Review and the Department of Environmental Quality published MAR Notice No. 17-239 regarding a notice of public hearing on the proposed amendment, repeal, and adoption of the above-stated rules at page 2523, 2005 Montana Administrative Register, issue number 24.

2. The Board and Department are adopting new rule VIII (17.4.307), shown below, in response to comments received. The text of New Rule VIII was originally published as part of proposed New Rule VI, but was moved to New Rule VIII for clarity. The Board has amended ARM 17.24.133, 17.24.134, 17.24.136, 17.24.1206, 17.24.1211, 17.24.1218, 17.24.1219, 17.24.1220, 17.30.2001, and 17.30.2003, and repealed ARM 17.24.1212, 17.30.2005, and 17.30.2006 exactly as proposed. The Department has amended ARM 17.56.121 and repealed ARM 17.38.606 exactly as proposed. The Board has amended ARM 17.24.132 as proposed, but with the following changes, new matter underlined, deleted matter interlined. The Board and Department have adopted New Rule V (17.4.305) exactly as proposed, and have adopted New Rules I (17.4.301), II (17.4.302), III (17.4.303), IV (17.4.304), VI (17.4.306), and VII (17.4.308) as proposed, but with the following changes, new matter underlined, stricken matter interlined:

17.24.132 ENFORCEMENT: PROCESSING OF VIOLATIONS AND PENALTIES (1) Except as provided in (4), the department shall send a violation letter for a violation of the Act, this subchapter, or the permit, license, or exclusion. The violation letter must be served and must state that the alleged violator may, by filing a written response within ~~15 days of receipt of~~ a time specified in the notice, provide facts to be considered in further assessing whether a violation occurred and in assessing the penalty under (2).

(2) through (4) remain as proposed.

NEW RULE I (17.4.301) PURPOSE (1) through (1)(d) remain as proposed.

(2) The purpose of the penalty calculation process is to calculate a penalty that is commensurate with the severity of the violation, that provides an adequate deterrent, and that captures the economic benefit of noncompliance. The department shall provide a copy of the penalty calculation to the alleged violator.

(3) The department may not assess a penalty that exceeds the maximum penalty amount authorized by the statutes listed in (1).

NEW RULE II (17.4.302) DEFINITIONS The following definitions apply throughout this subchapter:

(1) "Circumstances" means a violator's culpability associated with a violation.

(1) through (3) remain as proposed, but are renumbered (2) through (4).

~~(4) "Gross negligence" means a high degree of negligence or the absence of even slight care.~~

(5) "History of violation" means the violator's prior history of any violation, which:

(i) must be a violation of a requirement under the authority of the same chapter and part as the violation for which the penalty is being assessed;

(ii) must be documented in an administrative order or a judicial order or judgment issued within three years prior to the date of the occurrence of the violation for which the penalty is being assessed; and

(iii) may not, at the time that the penalty is being assessed, be undergoing or subject to administrative appeal or judicial review.

(5) remains as proposed, but is renumbered (6).

~~(6) "Ordinary negligence" means the failure to use such care as a reasonably prudent and careful person would use under similar circumstances.~~

NEW RULE III (17.4.303) BASE PENALTY (1) As provided in this rule, the department shall calculate the base penalty by multiplying the maximum penalty amount authorized by statute by ~~an extent and gravity~~ a factor from the appropriate base penalty matrix in (2) or (3). In order to select a matrix from (2) or (3), the nature of the violation must first be established. For violations that harm or have the potential to harm human health or the environment, ~~T~~the department shall classify the extent and gravity of ~~a~~ the violation as major, moderate, or minor as provided in (4) and (5). For all other violations, the extent factor does not apply, and ~~T~~the department shall classify the gravity of ~~a~~ the violation as major, moderate or minor as provided in (5).

(2) The department shall use the following matrix for violations that harm or have the potential to harm human health or the environment:

	GRAVITY		
EXTENT	Major	Moderate	Minor
Major	~~0.70~~ 0.90-0.76	~~0.60~~ 0.75-0.61	~~0.50~~ 0.60-0.46
Moderate	~~0.60~~ 0.75-0.61	~~0.50~~ 0.60-0.46	~~0.40~~ 0.45-0.31
Minor	~~0.50~~ 0.60-0.46	~~0.40~~ 0.45-0.31	~~0.30~~ 0.30-0.16

(3) The department shall use the following matrix for violations that adversely impact the department's administration of the applicable statute or rules, but which do not harm or have the potential to harm human health or the environment~~.~~:

	GRAVITY		
~~EXTENT~~	Major	Moderate	Minor
~~Major~~	0.50-0.37	~~0.40~~ 0.36-0.24	~~0.30~~ 0.23-0.10
~~Moderate~~	~~0.40~~	~~0.30~~	~~0.20~~
~~Minor~~	~~0.30~~	~~0.20~~	~~0.10~~

(4) through (4)(c) remain as proposed.

(5) The department shall determine the gravity of a violation as follows:

(a) A violation has major gravity if it causes harm to human health or the environment, poses a ~~significant~~ serious potential ~~for~~ to harm ~~to~~ human health or the environment, ~~results in a release of a regulated substance,~~ or has a ~~significant~~ serious adverse impact on the department's administration of the statute or rules. Examples of violations that may have major gravity include a release of a regulated substance ~~without a permit or in excess of permitted limits~~ that causes harm or poses a serious potential to harm human health or the environment, construction or operation without a required permit or approval, ~~or~~ an exceedance of a maximum contaminant level or water quality standard, or a failure to provide an adequate performance bond.

(b) A violation has moderate gravity if it:

(i) is not major or minor as provided in (5)(a) or (c); and

(ii) poses a potential ~~of~~ to harm ~~to~~ human health or the environment, or has an adverse impact on the department's administration of the statute or rules. Examples of violations that may have moderate gravity include a release of a regulated substance that does not cause harm or pose a serious potential to harm human health or the environment, a failure to monitor, report, or make records, a failure to report a release, leak, or bypass, or a failure to construct or operate in accordance with a permit or approval~~, mining or disturbing land beyond a permitted boundary, or a failure to provide an adequate performance bond~~.

(c) A violation has minor gravity if it poses a ~~low~~ no risk of harm to human health or the environment, or has a low adverse impact on the department's administration of the statute or rules. Examples of violations that may have minor gravity include a failure to submit a report in a timely manner, a failure to pay fees,

inaccurate recordkeeping, ~~and~~ or a failure to comply with a minor operational requirement specified in a permit.

NEW RULE IV (17.4.304) ADJUSTED BASE PENALTY - CIRCUMSTANCES, GOOD FAITH AND COOPERATION, AMOUNTS VOLUNTARILY EXPENDED (1) through (2)(e) remain as proposed.

~~(3) The department may increase a base penalty by:~~

~~(a) 1% to 15% for ordinary negligence;~~

~~(b) 16% to 29% for gross negligence; and~~

~~(c) 30% for an intentional act.~~

~~(4)~~ (3) The department may decrease a base penalty by up to 10% based upon the violator's good faith and cooperation. ~~The department expects that a violator will act in good faith and cooperate with the department in any situation where a violation has occurred. The department may decrease the base penalty only if the violator exhibits exceptional good faith and cooperation.~~ In determining the amount of decrease for good faith and cooperation, the department's consideration must include, but not be limited to, the following factors:

(a) through (c) remain as proposed.

~~(5)~~ (4) The department may decrease a base penalty by up to 10% based upon the amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or the impacts of the violation. The amount of a decrease is not required to match the amounts voluntarily expended. ~~The department expects that a violator will expend the resources necessary to mitigate a violation or the impacts of a violation.~~ In determining the amount of decrease for amounts voluntarily expended, beyond what is required by law or order, the department's consideration must include, but not be limited to, the following factors:

(a) expenditures for ~~extra~~ resources, including personnel and equipment, to promptly mitigate the violation or impacts of the violation;

(b) expenditures~~, not otherwise required,~~ of ~~extra~~ resources to prevent a recurrence of the violation or to eliminate the cause or source of the violation; and

(c) revenue lost by the violator due to a cessation or reduction in operations that is necessary to mitigate the violation or the impacts of the violation. ~~This does not include revenue lost due to a cessation or reduction in operations that is required to modify or replace equipment that caused the violation.~~

NEW RULE VI (17.4.306) TOTAL PENALTY - HISTORY OF VIOLATION~~, ECONOMIC BENEFIT~~ (1) As provided in this rule, the department may increase the total adjusted penalty based upon the violator's history of violation ~~as defined in 75-1-1001(1)(c) and 82-4-1001(1)(c), MCA, and based upon the economic benefit that the violator gained by delaying or avoiding the cost of compliance~~. Any penalty increases for history of violation ~~and economic benefit~~ must be added to the total adjusted penalty calculated under ARM 17.4.305 to obtain a total penalty.

(2) The department may calculate a separate increase for each historic violation. The amount of the increase must be calculated by multiplying the ~~adjusted~~ base penalty calculated under [NEW RULE ~~IV~~ III] (ARM 17.4.303) by the appropriate

percentage from (3). This amount must then be added to the total adjusted penalty calculated under ARM 17.4.305.

(3) The department shall determine the ~~gravity~~ nature of each historic violation in accordance with [NEW RULE ~~III(5)~~ II(6)] (ARM 17.4.302(6)). The department may increase the total adjusted penalty for history of violation using the following percentages:

(a) for each historic violation ~~with major gravity~~ that, under these rules, would be classified as harming or having the potential to harm human health or the environment, the penalty increase ~~may~~ must be ~~21% to 30~~ 10% of the ~~adjusted~~ base penalty calculated under [NEW RULE ~~IV~~ III] (ARM 17.4.303);

(b) for each historic violation ~~with moderate gravity~~ that, under these rules, would be classified as adversely impacting the department's administration of the applicable statute or rules, but not harming or having the potential to harm human health or the environment, the penalty increase ~~may~~ must be ~~11% to 20~~ 5% of the ~~adjusted~~ base penalty calculated under [NEW RULE ~~IV~~ III] (ARM 17.4.303)~~; and~~

~~(c) for each historic violation with minor gravity, the penalty increase may be 1% to 10% of the adjusted base penalty calculated under [NEW RULE IV]~~.

(4) If a violator has multiple historic violations and one new violation, for which a penalty is being calculated under these rules, the percentages from (3) for each historic violation must be added together. This composite percentage may not exceed 30%. The composite percentage must then be multiplied by the ~~adjusted~~ base penalty for the new violation to determine the amount of the increase. The increase must be added to the total adjusted penalty for the new violation calculated under ARM 17.4.305.

(5) If a violator has one historic violation and multiple new violations, each with a separate penalty calculation under these rules, the ~~adjusted~~ base penalties for the new violations calculated under [NEW RULE ~~IV~~ III] (ARM 17.4.303) must be added together. This composite ~~adjusted~~ base penalty must then be multiplied by the percentage from (3) for the historic violation to determine the amount of the increase. The increase must then be added to the sum of the total adjusted penalties calculated for each new violation under ARM 17.4.305.

(6) If a violator has multiple historic violations and multiple new violations, for which a separate penalty is being calculated under these rules, the percentages from (3) for each historic violation must be added together, not to exceed 30%, and the ~~adjusted~~ base penalties for each new violation calculated under [NEW RULE ~~IV~~ III] (ARM 17.4.303) must be added together. The composite ~~adjusted~~ base penalties must be multiplied by the composite percentage to determine the amount of the increase. The increase must be added to the sum of the total adjusted penalties calculated for each violation under ARM 17.4.305.

~~(7) The department may increase the total adjusted penalty, as calculated under [NEW RULE V], by an amount based upon the violator's economic benefit. The department shall base any penalty increase for economic benefit on the department's best estimate of the costs of compliance, based upon information reasonably available at the time it calculates a penalty under these rules. The economic benefit must be added to the total adjusted penalty calculated under [NEW RULE V] to obtain the total penalty.~~

NEW RULE VII (17.4.308) OTHER MATTERS AS JUSTICE MAY REQUIRE

(1) The department may consider other matters as justice may require to increase or decrease the total penalty. ~~The department may not decrease the penalty to offset the costs of correcting a violation.~~

NEW RULE VIII (17.4.307) ECONOMIC BENEFIT (1) The department may increase the total adjusted penalty, as calculated under ARM 17.4.305, by an amount based upon the violator's economic benefit on the department's estimate of the costs of compliance, based upon the best information reasonably available at the time it calculates a penalty under these rules. The economic benefit must be added to the total adjusted penalty calculated under ARM 17.4.305 to obtain the total penalty.

AUTH: 75-2-111, 75-2-503, 75-5-201, 75-6-103, 75-10-204, 75-10-405, 75-10-503, 75-10-1202, 75-11-204, 75-11-505, 75-20-105, 76-4-104, 82-4-111, 82-4-204, 82-4-321, 82-4-422, MCA
IMP: 75-1-1001, 82-4-1001, MCA

3. The following comments were received and appear with the Board's and Department's responses:

COMMENT NO. 1: Additional language should be added to confirm that a party will have a chance to provide additional information to the Department or to discuss a penalty before having to appeal to the BER.

RESPONSE: If the Department issues a penalty order for the violation, the statutes provide 30 days to appeal the order. The alleged violator may informally discuss the violation and penalty with the Department during the 30-day appeal period. The rules cannot change the statutory appeal period. Prior to initiating an enforcement action, the Department sends a violation letter to notify the alleged violator that the Department believes a violation occurred and to describe the actions that are necessary to return to compliance. A violation letter requests additional information and provides an opportunity for an informal conference to discuss the alleged violation and the recommended corrective action. Instead of issuing an order, the Department may send a letter offering settlement with a consent order and a settlement penalty. These letters also request that the alleged violator discuss the violation and penalty calculation with the Department. A change has been made to New Rule I to require that the Department provide a copy of the penalty calculation to an alleged violator. This change, together with the existing procedures, will provide adequate opportunities for the alleged violator to discuss the violation and penalty calculation.

COMMENT NO. 2: The rules give too much power to the Department. The Department can impose violations without evidence and assess penalties without documentation. The agency makes the regulations, interprets them, hears all protests, and determines guilt and penalties. The agency should have to prove guilt; the party should not have to prove their innocence. Guilt should be established by a third party. False accusations by the agency should carry a penalty for the agency

as determined by a third party. Rewrites of the proposal with different wording but with the same intent should be considered a violation of the Montana Constitution.

RESPONSE: The rules and the statutes under which these rules are adopted provide opportunities for a person who receives a notice of violation to contest the alleged violation and to offer new information. The statutes also give the person a right to appeal a Department penalty order to the Board, and a right to appeal a Board determination to state court. If a Department penalty order is appealed to the Board, and in any court action in which the Department seeks a penalty, the Department has the burden to prove that the violation occurred and that a penalty is appropriate. The process is designed to ensure that penalties will be assessed only when there is a preponderance of evidence to establish the violation. Modifications made to the proposed rules in response to comments are allowed under the Montana Administrative Procedure Act at 2-4-305, MCA.

COMMENT NO. 3: The new rules may lead to higher penalties than the former procedures. This was not the objective of the Department or the regulated community in the legislative process and rule development process. Several parties have determined that the penalties calculated under the new rules could be 20% to 30% higher.

RESPONSE: HB 428 was passed to standardize and streamline enforcement procedures for the reclamation laws. HB 429 was passed to standardize penalty calculations to make them fair, consistent and predictable. These legislative changes were not generally intended to result in an increase or decrease in penalties. However, in the legislation, the "size of violator" factor, which could be used to increase a penalty, was excluded, and the definition of "history of violation" in the legislation results in consideration of fewer historical violations to increase a penalty. On the other hand, amendments to the Opencut Mining Act in HB 429 allow the Department to assess penalties for additional days of violation, which will result in increased penalties.

Given the large variety of previous penalty calculation rules and policies used by the Department, it was difficult to guarantee that the legislation and the new rules would not result in higher or lower penalties. On a case-by-case basis, a penalty calculated under the new rules may result in a higher or lower penalty than was calculated under the previous method. However, in general, the penalties calculated under these rules will not be significantly larger or smaller than those calculated under previous procedures. As under the previous procedures, the Department has some discretion under the new rules to weigh the severity of violations. An untrained person could, under the new rules, calculate penalties that vary widely from the Department's previous assessments. However, the Department's familiarity with the previous procedures will enable it to maintain fairness to the extent possible.

COMMENT NO. 4: Some of the proposed rules may complicate rather than simplify enforcement and efficient resolution of violations.

RESPONSE: Some portions of the new rules are more complicated than previous penalty calculation rules. The new rules are more complex in that a base penalty is determined by separate matrix factors for nature, extent and gravity, rather

than, for example, the point system based on a combination of an extent and gravity factor used under the former penalty rules under the Water Quality Act. The description of how historical violations are calculated is also more complex, but the additional detail is necessary to inform the public and to guide the Department. As discussed in the Response to Comment No. 48, the Department and the Board have made a change to New Rule VI to simplify the procedure for weighing the severity of historic violations. A consistent method for calculating penalties will be more efficient and will not delay resolution of violations.

COMMENT NO. 5: The rules provide too much discretion to the Department in terms of when to act on a potential violation and how to resolve it, and when to dismiss some violations and not others without clear reasons why. The commentor does not see how these rules meet the stated goals of predictability and consistency.

RESPONSE: The statutes provide the Department with discretion whether to initiate an enforcement action. For example, the Water Quality Act provides that the Department "may issue an order." Section 75-5-611(2), MCA. This discretion allows the Department to address a violation with a penalty order or resolve it through other means such as compliance assistance. Typically, the Department seeks penalties for significant violations, and minor violations are addressed through other means. Some of the reclamation statutes specifically authorize a waiver of a penalty, provided certain conditions are satisfied and documented in writing by the Department. The rules will provide predictability and consistency in cases in which the Department calculates a penalty.

COMMENT NO. 6: The proposed rules take a good first step toward the goals of decreasing subjectivity and increasing consistency and predictability. The commentor appreciates the Department's good faith and would like to continue to be involved in implementation of these rules and the development of a Supplemental Environmental Projects policy.

RESPONSE: Comment noted.

COMMENT NO. 7: The proposed rules do not account for impacts to specially-designated, sensitive areas of the environment such as Class I PSD areas and sole source aquifers.

RESPONSE: Definitions of gravity and extent allow for the consideration of harm and potential for harm to human health and the environment. If a violation occurs that harms or poses risk of harm to a specially-designated, sensitive area, the severity of that harm and its impacts to that area will be considered in the penalty calculation.

COMMENT NO. 8: Little consideration has been given to the unique nature of the coal regulatory program. Coal mines are inspected monthly and the majority of violations have been administrative in nature and not a threat to human health or the environment. The proposed rules will significantly raise the penalties assessed for violations under the coal program. We were assured that increased penalties were not the intended outcome of the stakeholder process. It is unfair and bad

regulatory policy to arbitrarily increase penalties in some programs and to decrease penalties in other programs where the violation may result in actual environmental damage or endanger human health and welfare.

RESPONSE: See Response to Comment No. 3 regarding increased or decreased penalties and Response to Comment No. 32 regarding changes to the matrix for violations that impact administration.

COMMENT NO. 9: The proposed rules will not be consistent with the federal coal program. The proposed rules should be modified to be consistent with the federal program or the Board and Department should adopt the federal rules verbatim.

RESPONSE: Both HB 428 and HB 429 contain a contingent voidness clause that nullifies the portions of the legislation related to the Strip and Underground Mine Reclamation Act in the event the federal Office of Surface Mining (OSM) does not approve the new law and amendments. A request to review the legislation has been submitted to OSM. Until a decision has been obtained from OSM, the new rule procedures for administrative enforcement and penalty calculation for violations at coal mines are appropriate.

COMMENT NO. 10: The proposed rules do not include a size of violator factor. Interested parties were assured that the size of violator factor would be taken into account in penalty calculations.

RESPONSE: HB 429 does not provide for use of the size of violator factor. The Department assured interested parties that penalties will be commensurate with the severity of the violation and the rules will calculate a penalty that provides an adequate deterrent. The Department did not state that the size of violator factor would be taken into account in penalty calculations.

ARM 17.24.132(1)

COMMENT NO. 11: In the explanation following the proposed rule, it is stated, "The amendment to (1) also deletes the requirement that a violation be documented by an inspection." Current CAFO rules state that a notice of noncompliance letter cannot be sent out before an inspection is completed. This should be noted in the rules.

RESPONSE: The proposed amended rule applies to sites regulated under the Metal Mine Reclamation Act and does not affect CAFOs, which are regulated under the Water Quality Act. The CAFO permitting rules do not require that violation letters be based upon an inspection. Some violations, such as failure to submit required reports, can be documented without an inspection.

COMMENT NO. 12: The rules seem to give the Department a lot of "gray" area to work under. For example, the rules allow the Department to issue a single order, with no follow-up statement of findings, thus putting more burden on the supposed violator to respond quicker to avoid law by non-response.

RESPONSE: One purpose of HB 428 was to streamline the enforcement process under the reclamation laws to change a two-step process for issuing penalty

orders to a one-step process. The one-step order issued by the Department will contain all of the components and offer all of the rights provided in the old two-step process, such as a findings of fact, conclusions of law, assessed penalty, and order. The order will also provide a 30-day opportunity for appeal. The rules simplify the process and do not expand any "gray" areas. The period for appeal remains the same, so the new rules do not require a violator to respond more quickly.

COMMENT NO. 13: Several commentors suggested extending the 15-day period to file a written response to a violation letter to 30 days to correspond with the 30 days provided to request a contested case. The Department and the responsible party would benefit if all available information about an alleged violation is developed and shared before either party spends time and resources on an enforcement action. This would also conserve Board resources by reducing the number of appeals.

RESPONSE: The HB 428 amendments to 82-4-361, MCA, state that when the Department has reason to believe that a violation has occurred, it shall send a violation letter. The statute does not require that the alleged violator respond to the Department in a particular timeframe. The rule has been modified to eliminate the 15-day requirement to respond to the Department in writing.

COMMENT NO. 14: The rule does not prescribe any follow-up action after a violation letter is sent and does not require penalties or other enforcement consequences.

RESPONSE: Section 82-4-361(1), MCA, of the Metal Mine Reclamation Act does not limit or require a particular follow-up enforcement response after a violation letter is sent. Normally, under the Metal Mine Act, an enforcement action will be initiated if the violation is considered significant.

ARM17.24.132 (2)-(4)

COMMENT NO. 15: The portion of the rule that discusses penalties is completely discretionary because it says the Department "may" issue a notice of violation, not "shall." This is unacceptable. When a violation occurs, specific actions must be taken. If someone violates the law or rules, they should be punished. All this rule does is mandate that the party receive a letter. There is no detail as to when the Department will issue a "violation letter" as opposed to a "notice of violation." It grants the Department too much latitude.

RESPONSE: The discretion is provided by statute. Section 82-4-361(6)(a), MCA, states: "In addition to the violation letter pursuant to subsection (1), the department may also issue an order if it has credible information that a violation listed in subsection (2) has occurred." Section 82-4-361(2)(a), MCA, states: "By issuance of an order pursuant to subsection (6), the department may assess an administrative penalty. . ."

COMMENT NO. 16: This rule indicates that an order becomes final if a hearing has not been requested within 30 days. The rules should allow for an extension of the 30-day appeal period.

RESPONSE: The 30-day time period for filing an appeal is set out in statute and can not be modified or extended by rule. See 82-4-361(6)(b), MCA.

COMMENT NO. 17: This rule retains the opportunity to request an informal conference, but it is not clear if this request stays the need to file an appeal with the Board. It is important that the party not be forced to request an appeal simply to protect their legal position. The goal should be to encourage resolution without an appeal. The rule should be modified to allow an opportunity for an informal conference before having to submit an appeal. If a party requests an informal conference, then the rule should provide that the Department may defer the appeal period.

RESPONSE: The request for an informal conference does not stop the running of the statutory 30-day period for filing an appeal. See Responses to Comment Nos. 1 and 16.

COMMENT NO. 18: This rule indicates that the Department would follow a one-step enforcement process instead of the previous two-step process. Past orders have been lacking in facts and the two-step process was necessary to obtain sufficient evidence. The rules should define the level of documentation the Department is required to supply to support an alleged violation.

RESPONSE: Section 82-4-361(6)(a), MCA, states: "In addition to the violation letter sent pursuant to subsection (1), the department may also issue an order if it has credible information that a violation listed in subsection (2) has occurred." A two-step process is not necessary to obtain sufficient evidence. Under the new statutory procedure, the single order issued by the Department will contain findings of fact and conclusions of law. Under the revised process, the alleged violator will have a 30-day opportunity to appeal, which is equivalent to the previous two-step process.

ARM 17.24.133

COMMENT NO. 19: This rule discusses abatement of violations and suspension of permits. It should contain a provision for revocation of the permit as well.

RESPONSE: Procedures for revocation of permits are set out in the statute at Section 82-4-362, MCA.

ARM 17.24.134

COMMENT NO. 20: In the stated reason for the rule there appears to be an error. It says that penalties are addressed in 82-4-361(1), MCA. It should be 82-4-361(2), MCA.

RESPONSE: The comment is correct.

ARM 17.24.136

COMMENT NO. 21: It would be better if the Department served orders through physical or personal notification, rather than through certified mail. This would treat the violation more fairly and prevent a violator from claiming non-notification.

RESPONSE: The statute allows for either personal service or service by mail and the Department uses personal service when necessary. The statute provides that the effective date for service of orders by mail is the date of mailing. See 82-4-361(6)(b), MCA.

ARM 17.24.1220

COMMENT NO. 22: If a violation is determined to be serious enough to warrant a penalty, waiving the penalty should only occur in special circumstances and those circumstances should be detailed.

RESPONSE: The Strip and Underground Mine Reclamation Act and regulatory program require that a notice of noncompliance be issued for each violation, and that a penalty be proposed for each violation. The statute identifies the criteria under which a penalty may be waived. Section 82-4-254(2), MCA, states in part that the Department may waive the penalty for a minor violation if the violation does not harm human health or the environment or if it does not impair administration. ARM 17.24.1220(3) builds on the statutory waiver criteria by stating that, where a written abatement plan exists, the penalty may be waived only if abatement is satisfactory.

New Rule II Definitions

COMMENT NO. 23: The definition of "history of violation" from HB 429 should be included in this rule.

RESPONSE: The definition of "history of violation" has been added to New Rule II.

COMMENT NO. 24: The definition of "history of violation" does not distinguish between administrative orders that contain an admission or adjudication of a violation and administrative orders voluntarily entered into by the party with no corresponding admission or adjudication. Consequently, a party could have a penalty increased due to a history of violation predicated on an alleged violation that was neither admitted nor proved. This situation would result in a deprivation of property without due process in violation of the Montana Constitution. This also conflicts with HB 429 which refers to a history of prior violation, not history of alleged violations.

The use of a "no admission of liability" statement in consent orders is a very effective way to encourage amicable, swift and cost-effective resolution of alleged violations. The Department indicated in a December 21, 2005, memo that violations documented in a consent order would be counted toward history, even if the order disputes the violation or contains a "no admission of liability" clause. If responsible parties are penalized in this manner, they will be more likely to pursue appeals or other litigation in lieu of settlement. The commentor suggests that the Department

clarify the rules to provide that consent orders containing a "no admission of liability" statement cannot be used as evidence of a history of violation.

RESPONSE: The statute states that the history of violation "must be documented in an administrative order or a judicial order or judgment." Section 75-1-1001(1)(c)(ii), MCA. If a violation is documented in an order or an order on consent, the Department and the Board consider it to be "documented" for the purposes of HB 429 and this subchapter. Unless the Department specifically agrees otherwise in an order on consent, a "no admission of liability" clause in an order on consent does not prevent the Department from considering the historic violation when it calculates a penalty for a future violation. There is no due process problem because, at the time the penalty for the future violation is assessed, the violator will have the opportunity to challenge every aspect of the penalty, including the use of the historic violation.

New Rule III Base Penalty

COMMENT NO. 25: The commentor agrees with the distinction between violations that pose harm to human health and the environment and violations that impact administration. The Department has indicated that it is contemplating increasing the values in the matrix for violations that pose harm and decreasing the values in the matrix for violations that only impact administration as a way to emphasize the differences between the two categories of violations. We believe the better course of action would be to simply reduce the values in the matrix used for administrative violations.

RESPONSE: In Response to Comment No. 32, the Department and the Board have increased the matrix values for violations that harm human health or the environment. However, in response to other comments, the Department and the Board have also redefined gravity so that only the violations that cause harm or serious potential for harm are considered to have "major" gravity. The net effect is that penalties for violations with major extent and gravity may increase, but fewer violations would be considered major. The Department and the Board eliminated the extent factor for violations that only impact administration. See Comment No. 32 and Response.

COMMENT NO. 26: The commentor agrees with the distinction between major, moderate and minor extent. However, the definitions are somewhat vague. The commentor suggests specific revisions.

RESPONSE: New Rule III(4) provides that the Department may determine major, moderate, and minor extent based on the extent to which a violation deviates from the requirement. The determination is based on a consideration of listed factors including: volume, concentration, and toxicity of the regulated substance, the severity and percent of exceedance of a regulatory limit, and the duration of the violation. Although the terms "major," "moderate," and "minor" are not defined, they are reasonably clear when applied to the listed factors. Using terms such as "substantial" and "significant," as the commentor suggests, would not add clarity.

COMMENT NO. 27: Volume, concentration and toxicity are more appropriately considered in determining gravity and should be eliminated from New Rule III(4).

RESPONSE: In their ordinary meaning, the terms "extent" and "gravity" are closely related, and factors such as volume, concentration, and toxicity could be considered under either term. In developing the rules, the decision was made to consider these factors under "extent." Changing the rules to consider these factors under "gravity" now would not make a substantive difference in the calculation of penalties. The important thing is that factors such as volume, concentration, and toxicity be considered at some point.

COMMENT NO. 28: Subsection (5)(a) states that a violation has major gravity if it "poses a significant potential to harm human health or the environment." Significant potential more accurately describes a violation of moderate gravity. The Commentor suggests defining major gravity as "A violation has major gravity if it actually or is reasonably expected to result in pollution that represents a serious threat to human health or the environment."

RESPONSE: The Department and the Board agree that, for major gravity, the term "serious" is more appropriate than "significant." New Rule III(5)(a) has been modified to include, under major gravity, violations that cause harm or serious potential for harm.

COMMENT NO. 29: The rules are not stringent enough to penalize violators and do not provide an adequate deterrent to future violators.

RESPONSE: New Rule I(2) states that the purpose of the rules is to calculate a penalty that is commensurate with the severity of the violation, that provides an adequate deterrent, and that captures the economic benefit. The Department and the Board believe the proposed rules are stringent enough to penalize violators and to provide an adequate deterrent to future violators. As stated in the Response to Comment No. 30, the penalty matrix has been modified to allow higher penalties at the top end of the range.

COMMENT NO. 30: The matrix is too low because the largest possible penalty is only 70% of the statutory maximum. The largest penalty on the matrix should be the statutory maximum. The matrix for administrative penalties seems appropriate.

RESPONSE: In response to this comment, the matrix has been changed. The top end of the range for major-major violations was increased to allow for the calculation of a maximum penalty. Including the potential 30% increase in the base penalty for circumstances, the total adjusted base penalty for a violation that has a major extent and gravity factor of 0.90 can equal 100% of the statutory maximum. To accommodate the increase to 0.90 and maintain a consistent 0.14 range in each cell, the ranges are shifted upward for major and shifted downward for minor.

COMMENT NO. 31: Mining or disturbing land beyond the permitted boundary or failure to provide an adequate bond are both identified as moderate violations. These two acts should be major violations.

RESPONSE: The Department and the Board agree that the failure to provide adequate bond should be a major violation. It has a serious impact to the Department's ability to administer the reclamation requirements in the law. The failure to provide adequate bond has been added to the examples of violations with major gravity. Mining beyond the permitting boundary should remain as moderate for several reasons. First, the regulated entity has complied with the rules to some extent by obtaining a permit. Second, mining beyond a permitted boundary may not create a bonding problem. Finally, mining beyond the permitted boundary does not always constitute harm to human health or the environment. If mining beyond the permitted boundary does cause harm or a serious potential for harm, the Department would likely pursue enforcement under another statute with higher penalty authority, such as the Water Quality Act, to address the violation. In the final rule, mining beyond the permit boundary has been deleted as an example of a moderate gravity violation, but only because it duplicated the previous example pertaining to failure to operate in accordance with a permit.

COMMENT NO. 32: An early draft of the rules contained a range of multipliers in the penalty matrices. Several commentors disagree with the decision to eliminate the earlier range of multipliers proposed in draft rules and believe a range of multipliers will provide the Department with more negotiating tools. A range of multipliers gives the Department flexibility and allows for penalties that are fair and equitable given the different circumstances associated with an alleged violation.

RESPONSE: The Department and the Board have modified the matrices in New Rule III to include a range of multipliers. See Response to Comment No. 30. The individual ranges accommodate the range of values that were in the matrix proposed in the rules.

COMMENT NO. 33: Several commentors support the distinction in the rules between violations that cause harm and administrative violations, and support the use of a lower penalty matrix for administrative violations.

RESPONSE: Comment noted.

COMMENT NO. 34: The definition of major gravity to include a violation that results "in a release of a regulated substance" needs to be deleted or narrowed. The language could lead to minor spills being defined as major gravity violations.

RESPONSE: The Department and the Board have modified the rule to limit releases in the major gravity category to those that cause harm or pose a serious potential to harm human health or the environment.

COMMENT NO. 35: The definitions of each level of gravity in New Rule III(5) are vague and should be clarified.

RESPONSE: See Response to Comment Nos. 26, 28, and 34.

COMMENT NO. 36: New Rule III(3) should be revised to delete "extent" for administrative violations. The commentor recommends that only the gravity factor be used, and that it should match the point assessment in federal coal regulations.

RESPONSE: Extent has been deleted from the matrix for violations that impact only administration.

New Rule IV Adjusted Base Penalty

COMMENT NO. 37: New Rule IV states that "The Department expects that a violator will expend the resources necessary to mitigate a violation or the impacts of a violation." The "or" should be "and."

RESPONSE: The intention of the original rule was to use the conjunctive "and." The sentence has been deleted from the final rule because it did not have substantive effect.

New Rule IV(2) and (3) – Circumstances

COMMENT NO. 38: The terms "ordinary negligence" and "gross negligence" in New Rule IV(3) should be eliminated. It is not correct to assume that every violation results in some degree of negligence. In spite of best efforts to comply, process upsets happen. Ordinary negligence should not be presumed from the fact that a violation occurred.

RESPONSE: As proposed, the rules require the Department to consider a violator's "culpability" based on various factors set out in New Rule IV(2). The term "negligence" was used to describe the ranges of culpability. However, the Board and Department agree that "negligence" is a legal term of art. It is arguable that some violations of requirements under these laws may not involve legal negligence. For that reason, the term has been deleted from the final rule. The definitions for "ordinary negligence" and "gross negligence" have also been eliminated from New Rule II. As modified, the rules will allow the Department to adjust a penalty based on the culpability factors without regard to whether legal negligence is involved.

COMMENT NO. 39: Increases based on culpability should be smaller, to reflect the federal coal program.

RESPONSE: See Response to Comment No. 9.

COMMENT NO. 40: New Rule IV(2) allows the Department to adjust penalties up by 30% based upon the circumstances of the violation. To achieve fair penalty results, several commentors requested that adjustment of a penalty due to circumstances be considered in both increasing and decreasing the base penalty. For example, an act of God may result in the release of a regulated substance, despite the existence of adequate secondary containment and controls implemented by the responsible party.

RESPONSE: In applying the "circumstances" factor, the Department evaluates the culpability of the violator, using criteria such as what the violator knew, how the violator acted, and what control the violator had over the circumstances surrounding the violation. The base penalty, prior to consideration of circumstances, assumes that the violator had no culpability. Given that initial assumption, "circumstances" should only be used to increase a penalty. If the violation was the result of an act of God and prevention of the violation was completely beyond the

control of the responsible party, the violator would have no culpability and the Department would not increase the penalty based on circumstances.

New Rule IV(4) - Good Faith and Cooperation

COMMENT NO. 41: The Department should have the flexibility to reduce a penalty by up to 30% for good faith and cooperation as originally described in the August 2005 version of the draft rules. The rules propose a penalty decrease for "exceptional" good faith and cooperation. The statute does not qualify use of the word "exceptional" to qualify good faith and cooperation.

RESPONSE: Because the statute does not refer to "exceptional" good faith and cooperation, the word "exceptional" has been eliminated from New Rule IV(4). In the proposed rules, the possible combined penalty decrease for good faith and cooperation and amounts voluntarily expended totals 20%. A violator is expected to act in good faith and to cooperate with the Department, and is expected to mitigate the violation and impacts of a violation. In contrast, a violator is not expected to have a high level of culpability in the circumstances surrounding a violation. The Department and Board believe that circumstances weigh heavier in a penalty calculation than do good faith and cooperation and amounts voluntarily expended. Given this position, the rules should not create a situation where a 30% penalty increase for circumstances can be offset by a 30% decrease for good faith and cooperation and amounts voluntarily expended.

New Rule IV(5) Amounts voluntarily expended

COMMENT NO. 42: New Rule IV(5)(a) would allow the Department to consider revenue lost by the violator due to a cessation or reduction in operations necessary to mitigate the violation. Such a penalty reduction causes the Department to subsidize or offset the cost of correcting the violation. This provision is in direct conflict with New Rule VII which states "The Department may not decrease a penalty to offset the cost of correcting the violation."

RESPONSE: The Department and the Board agree that the provision in New Rule VII appears to conflict with New Rule IV(5). The provision has been deleted from New Rule VII. The provision also appears to conflict with the statute, which allows the Department to consider "amounts voluntarily expended by the violator, beyond what is required by law or order, to address or mitigate the violation or impacts of the violation." Section 75-1-1001(1)(f), MCA. To ensure consistency with the statute, the language "beyond what is required by law or order" has been added to the criteria for consideration of amounts expended in New Rule IV(5).

New Rule V Total Adjusted Penalty - Days of Violation

COMMENT NO. 43: New Rule V should be modified to provide that the Department "shall" consider each day of each violation as a separate violation subject to penalties. The Department should not be granted the latitude to count some days and not others. New Rule V(2) should be deleted entirely. Giving the

Department the latitude to count violations and sometimes not leads to inconsistent enforcement and subverts the goal of these rules.

RESPONSE: The statutes provide the Department with the authority and discretion to determine when to issue a penalty order and how many days to consider an entity to be in violation. It is important that the Department have that discretion. For example, a violation, such as a small gravel pit mined beyond the permitted boundary, may continue for several years. It would be unreasonable for the Department to multiply the adjusted penalty by several hundred days of violation and calculate a penalty that is clearly too large given the severity of the violation.

COMMENT NO. 44: In New Rule V, days of violation should start from the time of the Department's determination of an alleged violation or from the time the alleged violator is notified.

RESPONSE: Under the statutory penalty scheme, penalties are assessed based on the number of days a violation occurred. The Department will assess days of violation based on the evidence available to it at the time regarding the number of days that the violation occurred. Whether the violator was notified of the violation, and the violator's response to that notification, may be considered under circumstances in New Rule IV.

COMMENT NO. 45: For violations that pose harm, the Department should consider the gravity and extent of the violation and the economic gain in its determination whether to assess additional days of violation.

RESPONSE: Extent, gravity and economic benefit have little bearing on the days of violation. A violation with minor gravity and no economic benefit could occur for many days. Conversely, a violation with major gravity and a large economic benefit could occur for only one day. Therefore, the determination whether to assess additional days of violation is not related to extent, gravity or economic benefit.

COMMENT NO. 46: The rules should provide for consideration of a "commission" of a violation versus an "omission," when assessing days of violation, to distinguish between an operator who actually engaged in an action that is a violation over multiple days, as opposed to a violation that may have occurred on a single day, but which remained uncorrected for multiple days.

RESPONSE: Regardless of whether a violation is an "act" or "omission," it may have multiple days of violation. Applying this distinction to the days of violation determination would not be appropriate in all cases.

COMMENT NO. 47: Days of violation should not apply to violations that are administrative in nature since they do not involve an exceedance of a regulatory limit, a volume or a release of toxic substances.

RESPONSE: A violation that is only administrative in nature and that does not exceed a regulatory limit could occur for multiple days, such as construction or operation of a facility prior to obtaining approval.

New Rule VI Total Penalty - History of Violation, Economic Benefit

COMMENT NO. 48: The Department has not previously categorized violations as major, moderate, or minor, and it would be dubious legally and practically to do so for historic violations unilaterally and after the fact.

RESPONSE: The Department and the Board agree that it may be difficult to recreate the facts surrounding a historical violation and to quantify gravity. To simplify New Rule VI, the rule has been modified to base the penalty increase for historical violations solely on the nature of the historical violation, i.e., whether the violation caused or posed a risk of harm to human health or the environment or only impacted administration. To further simplify, the percent of penalty increase has been modified to 5% of the base penalty for each historical violation that impacts administration and 10% for each historical violation that causes harm to human health or the environment. The proposed modifications retain the 30% cap on a penalty increase based on history contained in the proposed rules.

COMMENT NO. 49: It is unclear how the Department will make the distinction between violations that pose harm to human health or the environment and violations that impact administration in making upward penalty adjustments for history of violation.

RESPONSE: Under the modified rules, penalty increases for history of violation are based solely on the nature of the violation. See Response to Comment No. 48. For historical violations, the Department can refer to the definition of nature provided in these rules.

COMMENT NO. 50: The proposed approach to determine the increase for history of violation based on gravity would be inconsistent with Rule III's goal of distinguishing between violations that harm human health or the environment and violations that are administrative in nature.

RESPONSE: See Response to Comment No. 48.

COMMENT NO. 51: New Rule VI applies the multiplier for "economic benefit" and "historic violations" to the adjusted penalty rather than the base penalty. This is inappropriate because there is no logical connection between the adjustments for cooperation or negligence and those for history of violation.

RESPONSE: Economic benefit is an individual calculation and is not multiplied by the base penalty or adjusted base penalty, but is added to the total adjusted penalty. In response to the remainder of the comment, New Rule VI has been modified such that the percentage increase for history of violation is multiplied by the base penalty rather than the adjusted base penalty. To avoid confusion, economic benefit has been separated from New Rule VI into New Rule VIII. See Response to Comment No. 57.

COMMENT NO. 52: New Rule VI must be revised to state that the economic benefits adjustment factor cannot be used to recover more than the statutory maximum penalty authorized by law.

RESPONSE: A provision has been added to New Rule I(2) to clarify that the penalties assessed under this subchapter may not exceed the maximum penalty allowed by statute.

COMMENT NO. 53: A party's history of violation prior to the promulgation of these rules cannot be used to increase the base penalty.

RESPONSE: The statute requires the Department to consider a violator's history, and defines history of violation as a violation documented in an administrative order or a judicial order or judgment issued within three years prior to the date of the occurrence of the violation for which the penalty is being assessed. The statute became effective on January 1, 2006, so a party's history of violation prior to the promulgation of the rules can be used to increase a penalty.

COMMENT NO. 54: An alleged violation that has not been admitted or proved should not be considered as history to increase a penalty.

RESPONSE: The statute allows a history of violation documented in an administrative order or a judicial order or judgment to be considered, whether or not the violation has been proved or admitted.

COMMENT NO. 55: The word "quantifiable" should be added in New Rule VI to assist the Department in determining economic benefit. Some standards should be applied.

RESPONSE: The rules require that the Department base the economic benefit calculation on the best information reasonably available at the time it calculates the penalty. During the 30-day appeal period following the issuance of a penalty order, the alleged violator has an opportunity to discuss the penalty calculation, including economic benefit, with the Department and provide better information. If the additional information provided indicates the Department's calculation of economic benefit is not correct, the Department would modify its calculation.

COMMENT NO. 56: Errors committed by the Department should be considered in the total penalty amount.

RESPONSE: If the Department commits an error in its penalty calculation, it will correct the error and recalculate the penalty.

COMMENT NO. 57: History of violation and economic benefit should be separated into different rules, because economic benefit may include a consideration of days of violation.

RESPONSE: To avoid confusion, the rules for history of violation and economic benefit have been separated.

COMMENT NO. 58: Consideration of extent and gravity of the historic violation should be removed because of unnecessary complications and it penalizes a violator twice for extent and gravity, rather than just for multiple occurrences.

RESPONSE: New Rule VI has been modified to base the increase for history of violation solely on the nature of the historical violation. See Response to Comment No. 51.

COMMENT NO. 59: The proposed rules limit history to a violation of the same chapter and part. This is more limiting than the federal approach which a historical violation of any environmental statute can be considered as history.

RESPONSE: The statute limits historic violations to those of the same chapter and part of the Montana Code. Section 75-1-1001(1)(c)(i), MCA.

New Rule VII Other matters as justice may require

COMMENT NO. 60: The phrases "demonstrably inadequate as a deterrent" or "inadequate to provide a deterrent" are arbitrary and not included in HB 429, and therefore should be stricken.

RESPONSE: The deterrence language was not included in the proposed rules.

COMMENT NO. 61: A partial list of "other matters" should be included. This is a very nebulous provision and it is hoped the Department will be very careful in its application. The "justice" factor should include a downward penalty adjustment when the Department makes a mistake. Hopefully it will not be necessary to use the rule very often, because all relevant factors have already been included in the penalty calculation.

RESPONSE: The Department and the Board expect that "other matters" that may justify a penalty increase or decrease will rarely occur. It is not feasible or appropriate to speculate and list in the rules what those other matters may constitute.

Reviewed by:

/s/
JAMES M. MADDEN
Rule Reviewer

BOARD OF ENVIRONMENTAL REVIEW

By: /s/
JOSEPH W. RUSSELL, M.P.H.
Chairman

DEPARTMENT OF ENVIRONMENTAL QUALITY

BY: /s/
RICHARD H. OPPER, DIRECTOR

Certified to the Secretary of State, _____, 2006.